

United States
Circuit Court of Appeals
For the Ninth Circuit.

TOM BROWN,

Plaintiff in Error,

vs.

HARRIET S. PULLEN,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Alaska, Division No. 1.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

J. H. COBB, Juneau, Alaska,

CARL LOGAN, Skagway, Alaska,

Attorneys for Plaintiff in Error.

JOHN B. MARSHALL, Juneau, Alaska,

Attorney for Defendant in Error.

*In the District Court for the First Judicial Division,
Territory of Alaska, United States of America,
at Skagway, Alaska.*

TOM BROWN,

Plaintiff,

vs.

HARRIET S. PULLEN,

Defendant,—ss.

Complaint.

The plaintiff, for his cause of action, complains and alleges:

I.

That he is a citizen of the United States and a resident of the Territory of Alaska.

II.

That the defendant is a resident of the Territory of Alaska, residing at Skagway, Alaska.

III.

That the plaintiff is an able-bodied man, and a farmer from birth, therefore, an all-round stockman.

IV.

That the defendant is the reputed owner of a stock ranch and general farm situated six (6) miles, or

thereabout, from Skaguay, Alaska, at a place formally called Dyea, Alaska.

V.

That on the 3d day of December, 1915, the defendant engaged the plaintiff at a monthly wage of sixty dollars (\$60.00) per month and board, to go to Dyea, Alaska (her ranch), and take care of her stock of about twenty head—i. e., feed and water stock; milk, make butter, etc.; look after buildings, and make himself generally useful thereabout.

VI.

That the plaintiff performed his duties faithfully, to the best interest of defendant. [1*]

VII.

That on June 4, 1916, the plaintiff, after giving defendant one month's notice, quit this said job, returned to Skaguay, Alaska, and demanded his pay.

VIII.

That on June 5, 1916, the defendant paid plaintiff Fifty Dollars (\$50.00) in cash and honored his written or oral order for Ten Dollars (\$10.00)—in all, Sixty Dollars (\$60.00).

IX.

That on June 5, 1916, the defendant re-engaged the plaintiff for the same job, at a monthly wage of Sixty-five Dollars (\$65.00) and board, until the following March.

X.

That the plaintiff faithfully performed his duties until June 11, 1917, when he quit.

*Page-number appearing at foot of page of original certified Transcript of Record.

XI.

That plaintiff demanded his pay, and on June 13, 1917, received the sum of Two Hundred Dollars (\$200.00) in the form of two checks—one for \$150.00 and one for \$50.00.

XII.

That on divers occasions between the dates of June 5, 1916, and June 11, 1917, the plaintiff received from the defendant miscellaneous articles of wearing apparel to the value of *Twenty-eighth* (\$28.00) or thereabouts, for which defendant has bills of cost.

XIII.

That the plaintiff has received in cash or otherwise a total sum of Two Hundred Eighty-eight Dollars (\$288.00) from the defendant.

XIV.

That the defendant is indebted to, and owes, the plaintiff [2] the sum of One Thousand One Hundred Fifty-seven Dollars (\$1,157.00), less Two Hundred Eighty-eight Dollars (\$288.00), or a total of Eight Hundred Sixty-nine Dollars (\$869.00), which on demand the defendant refused to pay.

THEREFORE, the plaintiff prays judgment against the defendant:

(1) For the sum of Eight Hundred Sixty-nine Dollars (\$869.00), with interest thereon from June 11, 1917, to date;

(2) For his costs and disbursements in this action;

(3) For a reasonable attorney's fee—Two Hun-

dred Dollars (\$200.00), being such a reasonable fee.

Respectfully submitted:

CARL LOGAN,
Plaintiff's Attorney.

VERIFICATION.

Territory of Alaska,
First Judicial Division,—ss.

Tom Brown, being first duly sworn, on oath, deposes and says:

That he is the plaintiff in the foregoing cause of action; that he has read and understands the foregoing complaint, and that the same is true of his own knowledge.

TOM BROWN.

Subscribed and sworn to before me this 8th day of August, A. D. 1917.

[Notarial Seal] PHIL ABRAHAMS,
Notary Public in and for the Territory of Alaska,
Residing at Skagway, Alaska.

My commission expires January 6th, 1918.

[Endorsed]: Filed Aug. 25, 1917, District Court, Alaska. J. W. Bell, Clerk of District Court, Dist. of Alaska, Division No. 1. E. A. Rasmuson, Dep.

[3]

*In the District Court for the District of Alaska,
Division No 1, at Juneau.*

No. 1716-A.

TOM BROWN,

Plaintiff,

vs.

HARRIET S. PULLEN,

Defendant.

Answer.

Answering the complaint of plaintiff, defendant says:

1. She admits the allegations contained in paragraphs 1, 2, 4, 8, 11, 12 and 13 thereof.

2. She denies the allegations contained in paragraphs 3, 7, 10 and 14 of plaintiff's complaint.

3. In answer to paragraph 5, defendant says, that she engaged plaintiff on or about the said 3d day of December, 1915, to work for her at the rate of one dollar per day and board, upon the agreement that he was to watch and care for her property at Dyea, Alaska, and to take care of and feed six head of stock at that time owned by her and kept upon said property, and defendant denies each and every other allegation in said paragraph 5 of said complaint contained.

4. Defendant denies the allegations contained in paragraph 6 of plaintiff's complaint.

5. Answering paragraph 9, defendant admits that plaintiff quit her employ on or about the time alleged, but alleges that when he returned to work

he agreed to work upon the same terms upon which he had previously been employed, to wit, one dollar per day and board, and denies that there was any agreement between the parties hereto for the employment of plaintiff's services for any specific length of time, and denies each and every other allegation in said paragraph contained not herein specifically admitted or denied. [4]

6. Defendant denies that she is indebted to the plaintiff in the sum set forth in paragraph 14 of his complaint or in any sum whatsoever, and alleges that she paid plaintiff various sums of money from time to time, in accordance with his request, among which were the specific sums set forth in said plaintiff's complaint, and alleges that on said thirteenth day of June, 1917, she settled with plaintiff in full for all claims the said plaintiff made against her, and plaintiff accepted said settlement in full satisfaction of all claims against defendant, and did not then or at any time thereafter make any demand upon defendant, or make any claim to defendant, that there was any sum or sums of money due or owing from defendant to plaintiff.

7. Defendant further denies each and every allegation in said complaint not hereinbefore specifically admitted or denied.

WHEREFORE, defendant demands judgment that the complaint against her be dismissed and for her costs and disbursements herein as by law provided.

JOHN B. MARSHALL,
Attorney for Defendant.

United States of America,
Territory of Alaska,—ss.

Harriet S. Pullen, being first duly sworn, deposes and says, that she is the defendant named in the foregoing answer; that she has read the same and knows the contents thereof and that the same is true as she verily believes.

HARRIET S. PULLEN.

Subscribed and sworn to before me this 21st March, 1918.

[Notarial Seal.] JOHN B. MARSHALL,
Notary Public for Alaska.

My com. expires Octr. 14, 1921.

Service of a copy of the foregoing is admitted this 21st March, 1918.

J. H. COBB,
Atty. for Plaintiff.

Filed in the District Court, District of Alaska,
First Division. Mar. 21, 1918. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [5]

*In the District Court for Alaska, Division Number
One, at Juneau.*

No. 1716-A.

TOM BROWN,

Plaintiff,

vs.

HARRIET S. PULLEN,

Defendant.

Reply.

Comes now the plaintiff, by his attorney, and for reply to the Answer of the defendant, alleges:

I.

He denies that the consideration of wage in the contract of employment between plaintiff and defendant was \$1.00 per day or any other sum than is alleged in his complaint.

II.

He denies that when he returned to work for the defendant as alleged in Paragraph Nine of his complaint, he agreed to work for \$1.00 per day and board, or for any other sum than is stated in his complaint.

III.

He denies that the defendant ever paid plaintiff any other sums of money than the sums alleged in this complaint and he denies that on the 13th day of June, 1917, or at any other time the defendant paid the plaintiff in full for all claims that the plaintiff made against her; and he further denies that he accepted from defendant any settlement or purported satisfaction in full of his claim against the defendant, and denies that there was any settlement or pretended settlement; and he further denies that the plaintiff did not then or at any time thereafter make demand upon defendant or claims for the other and further sums of money [6] due and owing by the defendant.

WHEREFORE he prays as in his original complaint.

CARL LOGAN,
Attorneys for Plaintiff,
J. H. COBB.

United States of America,
Territory of Alaska,—ss.

Tom Brown, being first duly sworn, on oath deposes and says the above and foregoing reply is true as I verily believe.

TOM BROWN.

Subscribed and sworn to before me this 25 day of March, 1918.

[Notarial Seal]

A. H. ZIEGLER,
Notary Public for Alaska.

My commission expires July 12, 1921.

Filed in the District Court, District of Alaska,
First Division. Mar. 25, 1918. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [7]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 1716-A.

TOM BROWN,

Plaintiff,

vs.

HARRIET S. PULLEN,

Defendant.

Judgment.

The above-entitled cause having come on for trial on Monday, March 25th, 1918, at the hour of ten o'clock A. M., and a jury having been duly impaneled, examined and accepted by the attorneys for the respective parties, and sworn according to law; and testimony of witnesses and argument of counsel having been duly heard; the Court having duly instructed the jury upon the law, and said jury having retired to consider of its verdict and having thereafter duly returned into court the following verdict, to wit:

“We, the Jury, duly impaneled and sworn in the above-entitled cause, find for the defendant”;

And the motion for a new trial having been duly overruled—

It is, therefore, ORDERED, ADJUDGED AND DECREED, that the plaintiff take nothing by his action herein, and that the defendant have and recover her costs herein, including an attorney's fee of Twenty dollars, to be taxed as by law provided.

Dated Juneau, Alaska, April 4, 1918, and the plaintiff is granted an extension of time until June 15, 1918, in which to prepare and present a bill of exceptions.

ROBT. W. JENNINGS,
Judge.

Entered Court Journal, No. O, page 143.

O. K.—COBB.

Filed in the District Court, District of Alaska,
 First Division. Apr. 4, 1918. J. W. Bell, Clerk.
 By C. Z. Denny, Deputy. [8]

*In the District Court for Alaska, Division No. 1, at
 Juneau.*

No. 1716-A.

TOM BROWN,

Plaintiff,

vs.

HARRIET S. PULLEN,

Defendant.

Bill of Exceptions.

Be it remembered, that on the trial of the above-
 entitled cause, the following proceedings were had
 to wit:

Approved.

JOHN B. MARSHALL,
 Atty. for Deft. [9]

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Testimony of Tom Brown, in His Own Behalf.

TOM BROWN, the plaintiff herein, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. State your name. A. Tom Brown.

Q. Where do you live now, Mr. Brown?

A. Treadwell.

Q. Are you employed over there? A. Yes, sir.

Q. Do you know the defendant, Mrs. Pullen?

A. Yes, sir.

Q. Were you ever employed by her?

A. Yes, sir.

Q. When were you first employed by her?

A. I went over to Dyea on the 3d of December; I did a little work for her just before, but it didn't amount to anything—just a little carpentering or something like that.

Q. On the 3d of December of what year?

A. 1915.

Q. What were you employed to do?

A. Look after the cattle what was on the ranch, haul hay, haul wood, look after the potato-house when it was cold, saw wood and keep a fire in it; and Royal and I worked under a great big building—what they call the Pacific Hotel; we were digging the foundation out—digging for the foundation; then I made gates, and put up some fences, and repaired fences, and all kinds of common farm work.

(Testimony of Tom Brown.)

Q. Just tell the jury where this place is that you went to work at.

A. Dyea is about 4 miles from Skagway—something like that. [11]

Q. Over where the old town of Dyea used to be?

A. Yes, sir; where the rush was.

Q. Was there any agreement what you were to be paid? A. Yes.

Q. What was it?

A. I met Mrs. Pullen in Skagway, right opposite that saloon there; and she asked me then several times, she said, "The cattle are out, Tom, and it is snowing, and Mr. Clark is not looking after them, and if you will go and look after them I will give you \$60.00 a month and board"; and of course I would have to cook a great deal of it myself, you see. Mr. Clark told me he had been receiving \$60.00 a month, and I think she had two boys there working putting up the telephone or something like that, and she told me herself she was paying \$60.00 a month.

Mr. MARSHALL.—If the Court please we object to any evidence as to what she was paying some boys for running a telephone line.

Mr. COBB.—It is what the defendant told him.

Q. Do you know the going wages in that country for an employee employed to do the work you were, general labor?

A. Yes, never less than \$3.00 a day.

Q. How long did you work under that arrangement?

(Testimony of Tom Brown.)

A. I got into Skagway June 4th, 1916, and I gave her a month's notice before I came in.

The COURT.—This contract, you say, was made in December, 1915?

A. Yes, sir.

The COURT.—Now, what about June, 1916?

A. I worked until June, 1916, at that rate of wages—from December, 1915, to June, 1916, the 5th of June, at \$60.00 a month.

Q. On that date did you see the defendant, Mrs. Pullen? [12] A. Yes, sir.

Q. Where did you see her?

A. I asked her if she had a man ready to take my place, when I came in, and she said no, she had not, she had no one to take my place.

Q. Had you given her notice before that you were going to quit? A. Yes, sir; a month's notice.

Q. Why did you do that?

A. Because I was not satisfied.

Q. I mean why did you give the notice—what was the necessity?

A. I wanted to go to work somewhere else.

Q. You did not want to leave the cattle without attention, you mean?

A. No, sir; the reason I gave her notice I wanted to go back to either Burns or Frye-Bruhn; I had been with them for quite a number of years in White Horse.

Q. And as I understand you did not want to leave the place with nobody on it?

(Testimony of Tom Brown.)

Mr. MARSHALL.—You tried to get him to say that but he wouldn't do it.

Mr. COBB.—I am asking him now.

Mr. MARSHALL.—No, you are telling him what he said, and he didn't say anything of the kind.

Q. Was there any other reason then besides your wanting to go to work somewhere else why you took pains to give her notice?

A. Yes, because I thought if I quit without any notice and come in, she wouldn't have anyone to take care of the cattle, but when I gave her a month's notice she had time to get someone to look after the cattle.

Q. When you got into Skagway did you see the defendant, Mrs. Pullen? A. Yes, sir. [13]

Q. What, if anything, occurred between you then, Mr. Brown?

A. She gave me \$50.00 then, on the 5th, I think it was, and told me if I would go back and look after the cattle and do as I had been doing she would give me \$65.00; and she said she had a nephew, Mr. Smith, going along, and I told her if Mr. Smith came along I would be only too glad to have him take my place. Mr. Smith came along but she did not put him in my place, and he was working around the hotel; and after he worked a little while he quit and went over to White Horse and scabbed on the longshoremen to get money, and he told me—

The COURT.—Never mind that.

Q. Did you go back to work for her?

(Testimony of Tom Brown.)

A. Yes, sir, at \$65.00 a month.

Q. She paid you \$50.00 in cash—did she give you any more at that time?

A. Yes, sir; Mrs. Aimes was there cooking a little while; she cooked and did a little extra work on the potatoes. Mrs. Aimes came over and she was sick, and Mrs. Pullen came over and took her back to Skagway; and Mrs. Aimes wanted to pay the doctor bill, or something, and said she was a little short of money, and she came to the phone and she said to me, "Could I borrow \$10.00 from you?" And I told her that I didn't have it, that I was short, and she said, "Can't you ask Mrs. Pullen for it? She owes you money." I said, "Tell Mrs. Pullen to come to the phone." Mrs. Pullen came to the phone and I told her to let her have \$10.00.

Q. That made the \$60.00, then? A. Yes, sir.

Q. How long did you work there for \$65.00 a month? A. Until the 11th of June.

Q. What year? A. 1917. [14]

Q. During the time—between the time that you went to work there at \$65.00 a month and the time you quit, did she pay you anything more in any way?

A. You mean between June 5th and June 11th?

Q. Yes.

A. Well, I got some clothes, yes, and I got—

Q. Explain that to the jury. You have given her credit for \$28.00 in your bill here—explain it to the jury.

A. When I went back on the 5th of June or 7th of

(Testimony of Tom Brown.)

June, whatever it was—well, I came in on the 13th of January and I had \$3.00 to pay for a boat; and I came in for shoes—everything was getting slippery and the horses could not stand. They were not shod at all—she did not keep the horses shod in winter—they do much better without—and I came in on the 13th of January and paid \$3.00 for coming in from Dyea to Skagway.

Q. That was fare on the boat?

A. Well, an Indian brought me in in a canoe. And then I told Mrs. Pullen about paying this \$3.00, and she says all right, and she gave me \$6.00—do you see, \$6.00, and she says, “I will charge this up to you, and you charge the \$3.00 up to me,” and I said all right.

Q. Did she furnish you any clothes on your order, or buy you any clothes?

A. Yes, sir; I have the bill for the clothes. She never brought no bill over herself, but what she told me they cost I put that down. January 13th I received \$6.00—that is when I came over, you know.

Q. (By Mr. MARSHALL.) Just a minute—is that book you have a memoranda of the entries made at the time?

A. Yes, a book that I took up to Dyea.

Q. (By Mr. MARSHALL.) Did you write that in there at the time you [15] got the clothes, or when?

A. I beg your pardon—let me explain. On January 4th, Mrs. Pullen promised if I would go up about half a mile into a big old house with 8 rooms, she

(Testimony of Tom Brown.)

would come over and cook herself, or else bring a lady cook to cook for Mrs. Pullen and I, which she never did.

Q. (By Mr. MARSHALL.) I did not ask you that. I asked you if you wrote that memoranda in the book at the time the stuff was brought to you?

A. Well, after—

Q. (By Mr. MARSHALL.) Just answer my question.

A. After the 4th of January I did; I had this old book before.

Q. (By Mr. MARSHALL.) Did you write it at the time you got the thing?

A. Let me explain what I have marked down, what I had received from her. When her house burned down the book was burned up, and everything that I had was burned up, all my clothes, shoes, underwear, and everything; and then I explained it to you that she brought—

Q. (By Mr. MARSHALL.) And then you wrote this down afterwards in that book?

A. After the fire, because my book was burned up.

Q. (By Mr. MARSHALL.) And you wrote it from memory?

A. Well, I could remember it all.

Q. (By Mr. MARSHALL.) You wrote it from memory? A. Yes, sir.

Mr. MARSHALL.—All right.

The WITNESS.—On February the 4th, the house burnt down, and then about the 7th Mr. Moseek and

(Testimony of Tom Brown.)

Mrs. Pullen came over—I sent him in to tell her the house was burned down, and Mr. Moseek and Mrs. Pullen came over, and she brought shirts and some more things that I cannot recollect, and I gave her credit for \$6.00. [16]

Q. That is what she told you it cost? A. Yes.

Q. Did you make that memorandum at the time she told you? A. I think I did, yes—yes, sir.

Q. Now, what else?

A. In this fire I lost \$12.00—I lost the \$6.00 that Mrs. Pullen had paid me before, and I lost \$6.00 more; and I lost a pin that was worth \$150.00.

Q. Never mind about that, it doesn't make any difference, but what did Mrs. Pullen bring you that you credited her with, that she bought for you after the fire?

A. There is this bill, \$6.00; she told me it was for shirts, and so forth. And then on March 5th I asked her for some money, for her to let me have a little money, and she gave me \$5.00, on March 5th.

Q. Have you given Mrs. Pullen credit for all she paid you in wages—did you ever receive any more than \$288.00 from her?

A. That is all I received.

Q. Now, Mrs. Pullen claims there were only six head of cattle there—how many cattle did you have to take care of? A. Three horses.

Q. Three head of horses?

A. Three head of horses was there, and she had seven head of cattle—that made 10.

Q. That was when you first went there?

(Testimony of Tom Brown.)

A. Yes.

Q. How many were brought in later?

A. I raised them up from this 10 until the 11th of June when I came away. I had gotten them up to 30. I advised her to buy cows and bring them over there, and I got them up to 30.

Q. What kind of cattle were these—any milk stock among them? [17]

A. Yes, milk stock and beef stock.

The COURT.—What is the object of this, Mr. Cobb?

Mr. COBB.—I want to show the jury the character of work that he did.

The COURT.—This plaintiff claims that he had a contract, that he was to be paid so much, and that he has been paid so much. That is your case in chief. It might be admissible in rebuttal, but I cannot see the object of going into those things on direct examination.

Mr. COBB.—All right; you may cross-examine.

Cross-examination.

(By Mr. MARSHALL.)

Q. Mr. Brown, how much work did you do for Mrs. Pullen, the defendant in this case, prior to going over to Dyea?

A. I did a little gardening, and she had me work in,—

Mr. COBB.—I object to that as not proper cross-examination and as irrelevant and immaterial.

The COURT.—On what theory, Mr. Marshall, do you think that is admissible? From the pleadings it

(Testimony of Tom Brown.)

seems to be simply a controversy as to whether the contract was for \$60.00 a month or \$30.00 a month and board.

Mr. MARSHALL.—He has made the allegation that he is an able-bodied man, and that he did certain work over there, and we have denied those allegations.

The COURT.—Absolutely immaterial allegations, unless you propose to set up in your answer that he did not do his work.

Mr. MARSHALL.—I think we will deny that he did certain work which he says that he did—

The COURT.—But, you admit that you had a contract with him for \$30.00 a month and that you have paid him, so consequently it don't make any difference about his work—you [18] paid him according to the contract.

Mr. MARSHALL.—That is very true, if the Court please—we claim to have paid him in full for the services rendered.

The COURT.—Then, your contract, according to your statement was \$30.00 a month, and you say you paid him. He says the contract was \$60.00 a month and that he has not been paid, so the only question in issue is what the contract was.

Mr. MARSHALL.—He alleges in here that he was an able-bodied man and that he was accustomed to receiving the going wages. We want to show that he worked for Mrs. Pullen for a small sum of money and his meals, that he had no employment, and he

(Testimony of Tom Brown.)

took up this work for that reason rather than the reason he said.

The COURT.—This suit is on a contract, and your defense is that your contract was for \$30.00 a month. It is true that he alleges in his complaint that he is an able-bodied man, but that does not make any difference. It is simply a question of what the contract was, and not whether or not the services were performed, because you virtually admit the services were performed by saying that you had a contract with him for \$30.00 a month and that you paid him.

Mr. MARSHALL.—Very well.

Q. I will ask you then, Mr. Brown, where you made this contract with Mrs. Pullen.

A. Right opposite the Pantheon saloon—Mr. Anderson's saloon, I met Mrs. Pullen right there.

Q. I want to ask you in regard to the payments you received, whether or not you received any other sums than those set up in your complaint. A. No, sir.

Q. Didn't you testify a few moments ago that she paid you \$5.00 [19] there on a certain occasion?

A. Yes, in March.

Q. Now, is that admitted in your complaint?

Mr. LOGAN.—If the Court please, the complaint, I think, covers that on account of the miscellaneous articles,—that is, the \$28.00 received in miscellaneous articles, that is cash and so forth.

The COURT.—You are not on the witness-stand, Mr. Logan. Your complaint alleges \$28.00—he is testifying to what he was paid. Mr. Marshall is cross-examining him.

(Testimony of Tom Brown.)

Mr. LOGAN.—The reason I make the remark now is that I did not consider it proper direct examination to go into that question at this time.

The COURT.—But it is proper cross-examination.

Q. Now, when did you state that the \$5.00 was paid you—was it on March 6th?

A. Some time in March I got the clothes—about March 6th.

Q. And then you say there was another sum of \$3.00 paid you when you went over to Skagway, when the Indians towed you over?

A. I said there was \$6.00 in January—the 13th of January.

Q. \$3.00, however, was to pay for taking you over there, wasn't it?

A. I paid the \$3.00 to the Indian, and she gave me \$6.00; and I charged Mrs. Pullen up with the \$3.00, and Mrs. Pullen said she would charge me with the \$6.00.

Q. That is \$11.00 which you received beside that admitted in *you* complaint, is it not?

A. I don't know.

Q. Well, you have alleged in your complaint that you received \$50.00 and \$10.00 at one time, and at another time you received \$200.00 altogether—that is all that you admit you have received, in your complaint, isn't it? [20]

A. I am not sure about that.

Q. Then, if that is a fact, this \$11.00 was in addition to the amount that you admit you received?

Mr. COBB.—I object to that line of cross-exami-

(Testimony of Tom Brown.)

nation—it is not fair. He has admitted \$28.00 there in addition to the \$288.00.

The COURT.—Payment is an affirmative defense. The plaintiff alleges in the complaint he has been paid so much, and the answer admits he has been paid so much. If you claim that he was paid more than that, when you come to put in your side of the case you put in proof to that effect, but it is not cross-examination of this witness.

Q. Mr. Brown, when did you receive this \$50.00 and \$10.00 that you speak of, when was that?

A. About the 5th of June, 1916.

Q. You received that after you had quit work?

A. I was over from Dyea and Mrs. Pullen gave me a check in Kennedy's store for \$50.00.

Q. And she at that time also gave you \$10.00—when did she give you that?

A. She had never given me any such thing, not before the \$50.00—that was the first I received.

Q. I am asking you when you received the \$10.00 which you say you received?

A. Mrs. Aimes received the \$10.00 the latter part of June or the fore part of July; she came back, I think, some time in the fore part of July, but it was in June that she asked me for the \$10.00.

Q. You say here, "That on June 5th, 1916, the defendant paid plaintiff \$50.00 in cash and honored his written or oral order for \$10.00—in all, \$60.00." When was that—on June 5th, as the pleadings say it was, or when was it? [21]

A. The ten dollars, you mean?

(Testimony of Tom Brown.)

Q. The \$10.00 and the \$50.00.

A. The \$50.00 was on June 5th, and the other \$10.00 was given to Mrs. Aimes the latter part of June, as near as I can remember. I credited Mrs. Pullen with the \$10.00.

Q. At the time you received the \$50.00 how much was there due you?

A. 6 months at \$60.00 a month.

Q. And you only received \$50.00 at that time?

A. That is all.

Q. Then, when did you re-engage with Mrs. Pullen? A. After I got that check from her.

Q. On the same day?

A. Well, I think it was the same day, or the day after; I couldn't swear, but it was somewhere right about then, I think—I couldn't swear to it; I was in Skagway 4 days before I went back.

Q. Why didn't you ask then for the balance of the money due you?

A. I did, and Mrs. Pullen said she was short of money, and she was short of a horse—the horse that died—Mrs. Pullen had only one horse over on the farm, and I would plow,—

Q. I don't care about that. I want to know why you did not demand the rest of the money that was due you at that time?

A. I did; and besides, Mrs. Pullen said, "You don't want any money over in Dyea."

Q. When you received that \$50.00 check did it have any endorsement on it of what it was in payment for?

(Testimony of Tom Brown.)

A. It said, "Pay Tom Brown \$50.00"; and I bought a suit of clothes in the store and gave it over to Mr. Kennedy; and Mrs. Pullen made the check out in Kennedy's, in kind of a little office where he keeps his safe.

Q. Are you satisfied the check had on it nothing but the [22] statement, pay to Tom Brown \$50.00?

A. I am sure of that.

Q. It had nothing on it but "pay Tom Brown, \$50.00"?

Mr. COBB.—That is not cross-examination and we object.

The COURT.—I think it might be, because it might throw light on whether there was such a contract as he claims.

Q. I will show you a check, Mr. Brown, and ask you if that is the check you received from Mrs. Pullen at the time?

A. Yes; "for services up to May 1st, 1916," was never on that—it is not the same writing as the other—it is not the same handwriting as the other.

Q. And that is the reason you say it was never on there, is it?

A. Don't you think it is a different,—

Q. I don't want to tell you what I think.

A. I will swear that, "for services up to May 1st, 1916," was never on there.

Q. And is your reason for it that it is not the same writing? A. It don't look like the same writing.

Q. Is that your reason for swearing to that?

(Testimony of Tom Brown.)

A. I will swear there was no such thing as that, "for services up to May 1st, 1916,"—it was not on there.

Q. Is that your reason for swearing that it is not the same writing?

A. I will swear that it was not on.

Q. That is not what I asked you. You can answer the question. What is your reason for saying that it wasn't on there?

A. Because I didn't see it on.

Q. You stated just now that it was not the same writing—is that your reason for it as well?

A. It don't look like the same writing to me.

Q. That is as far as you are willing to go on that?

A. Yes. [23]

Mr. MARSHALL.—If the Court please, we offer this in evidence as Defendant's Exhibit No. 1.

Mr. COBB.—We object to it as not proper cross-examination, and not material at this time.

The COURT.—It is proper cross-examination, but it is not the time to offer it, because he denies that that is the check—he denies that that is the condition the check was in when the check was delivered to him—he does not identify the check. Wait until your side of the case comes on to be heard. You can have it identified as being denied by him.

Mr. MARSHALL.—I will mark it for identification at this time.

(Whereupon said check was marked Defendant's Exhibit No. 1 for identification.)

Q. Now, Mr. Brown, when did she pay you any

(Testimony of Tom Brown.)

more money after that \$50.00?

Mr. COBB.—I object to that as not cross-examination. That throws no light upon the contract at all—that is the only thing that he has testified to.

The COURT.—You mean when did she pay him any more of the money he admits he got?

Mr. MARSHALL.—I am asking when she paid him any more money.

The COURT.—I think that is cross-examination, because it might throw light on the contract—I cannot tell whether it does or not.

Q. Answer the question, Mr. Brown.

A. Well, yes, I got \$6.00, as I told you, in February—is that what you want to know?

Q. February of the next year?

A. Yes, in February, 1917.

Q. Is that all?

A. Well, I got the other sums that I told you.

Q. What were they, and when? [24]

A. \$5.00 in cash in March.

Q. 1917? A. Yes.

Q. Then what else?

A. \$200.00 the 13th of June—I came in on the 11th and she paid me on the 13th.

Q. Where was that paid to you?

A. Mrs. Pullen took me into her private room and made the checks out.

Q. Those checks were turned over to you for that sum? A. Yes, the \$50.00 and the \$150.00.

Q. At the time they were turned over—was there

(Testimony of Tom Brown.)

any discussion between you and Mrs. Pullen as to what was due you?

A. Yes, she told me, she said, "I can only give you this here \$200.00, but you go down to Royal in Treadwell and Royal will give you a good job, and I will send you the balance of the money along." I said I would rather be paid up the balance of the money that was coming to me before I left Skagway.

Q. Was there any dispute between you as to what was owing you?

A. I wanted her to settle up, and I asked her—she had three carpenters working outside—she told me this—she was paying them \$6.00 a day, and another man she was paying \$4.00 a day, and she told me that she could not spare the money, and that she was improving her property; she told me it was going to cost her about a thousand dollars.

Q. Now, was there any agreement between you as to the amount that was due?

A. Yes, there was; she said to me—I told Mrs. Pullen, "We will right everything up," and she said, "There is no use to reckon it up now, Tom, because I cannot pay you; but you have, I guess, something about \$900.00 coming"; [25] and I said, "We will reckon it up, anyhow." We did not reckon it up. She said, "I cannot give you any more than \$200.00 just now," and she did not want to give me any more.

Q. Then, what did you say to her?

A. Then, she told me if I would go down to Treadwell, her son Royal down here would give me a good

(Testimony of Tom Brown.)

job and that she would send the money along. I told her I did not want to leave Skagway until I got my money. And then I met Mrs. Pullen about the 2d of July, and I told her, "Mrs. Pullen, I would like you to settle up with me as I want to go away below." She turned around to me and she said, "You dirty skunk, you have nothing coming"; and she turned around from me and went down the steps.

Q. That was on what date?

A. As near as I can recall the second of July—I wouldn't swear to it, but I think it was around there.

Q. Was there anyone present at that conversation?

A. There was a few men, longshoremen and such like around—about three, I guess.

Q. Do you know who any of them were?

A. I forget now who they were.

Q. Can you recall their names?

A. No, sir; I cannot; I could not swear to who they were right now.

Q. On the 13th of June she had paid you this \$200.00? A. Yes, sir.

Q. Did you have any further conversation with her at that time than what you have now related, that she told you to go to Treadwell and Royal would give you a job?

Mr. COBB.—I think that has been gone far enough into for the Court to see that it cannot possibly be cross-examination. [26]

The COURT.—I do not agree with you Mr. Cobb.

(Testimony of Tom Brown.)

He is asking him now whether he had any further conversation.

Mr. COBB.—After he quit work.

The COURT.—Conversations after he quit work might throw light on what their contract was—I cannot tell.

Q. Did you have any further conversation with her at that time other than the conversations you have related, that she told you to go to Royal at Treadwell and he would give you a job—answer that question?

A. No, sir, no; I cannot recall any other conversation.

Q. That covers the whole conversation between you. Now, after the conversation with Mrs. Pullen when she gave you these checks, did you have any other conversation with her, or see her at any time, until this 2d day of July that you are talking about? A. The 2d day of July?

Q. Yes.

A. No, I did not have no conversation with Mrs. Pullen at all.

Q. You never demanded of her the additional money that you claim was due you at any time between the 13th of June and the 2d day of July?

A. No, I gave her a little time to pay it in, as I promised her.

Q. And you are unable to tell me any of the men who were present when you had this conversation with her on the 2d of July?

A. Yes, I am unable to tell you; I could not swear

(Testimony of Tom Brown.)

who they were right now.

Q. Are you certain that there were any men present? A. Certain there were men present, sure.

Q. How do you know that?

A. They were standing right by Mrs. Pullen.

[27]

Q. And they were longshoremen?

A. Yes, they were longshoremen.

Q. Don't you know what longshoremen they were in Skagway?

A. Yes, but I cannot remember now who it was; I could not swear who it was.

Q. I will ask you if these are the checks that were given you on the 13th of June?

A. Yes, but I didn't see "Paid in full."

Q. And on the other one did you, "Paid for farm work at Dyea"? A. No, I did not.

Q. You don't think either of those were on there?

A. No, I just saw, "Pay to Tom Brown, \$150.00"; and, "Pay to Tom Brown, \$50.00."

Mr. MARSHALL.—I ask that those be marked for identification.

(Whereupon said checks were marked Defendant's Exhibits 2 and 3, respectively, for identification.)

Q. Mr. Brown, who was present when you made your original contract with Mrs. Pullen?

A. There was nobody, only Mrs. Pullen and I.

Q. Where was that made?

A. Right opposite the Pantheon saloon, on the main street.

(Testimony of Tom Brown.)

Q. The Pantheon saloon?

A. Yes, right on the main street.

Q. That was the original contract you made with her when you went over there? A. Yes, sir.

Q. When you made the second contract was there anyone present?

A. No, it was in Mrs. Pullen's room—private room.

Q. When you originally went to Dyea was there anyone on the place besides yourself?

A. No, sir; Clark was in Skagway, and they took me over and I rounded up the cattle and put them in the barn the best I [28] could, and Clark went back to Skagway.

Q. Then you were alone?

A. I think he worked for his board for Mrs. Pullen for about two months; he worked in January, and I think he went away in the fore part of February.

Q. Was there anyone there during that time?

A. No, sir.

Mr. COBB.—I object to that as not cross-examination.

The COURT.—I cannot tell.

The WITNESS.—Mrs. Pullen came over with Royal—a few days after he brought her over—I think they brought some groceries, or something like that, and Mrs. Pullen stayed three weeks in December, and that was the longest time that Mrs. Pullen was on that ranch while I was there.

(Testimony of Tom Brown.)

Q. I didn't ask you that. I asked you whether anyone else was there.

A. Mrs. Pullen, Royal and Clark; Royal and I worked together.

(Whereupon court adjourned until 1:30 P. M.)

AFTERNOON SESSION.

March 27, 1918, 1:30 P. M.

TOM BROWN, on the witness-stand.

Cross-examination (Cont'd).

(By Mr. MARSHALL.)

Q. I wish to ask you further, Mr. Brown, what were the articles of clothing that were brought over to you that you have allowed \$28.00 for?

Mr. COBB.—That is not proper cross-examination.

The COURT.—Now, Mr. Marshall, do you offer this as throwing any light on the question of whether or not there was a contract between them? [29]

Mr. MARSHALL.—No, I simply offer it on the credibility of this witness. He states the clothing was so much, of such and such value, and I want him to testify what the value of it was.

The COURT.—This witness, under the pleadings in this case, could have gotten on the stand and simply testified that there was a contract by which he was to get \$60.00 a month, and then stop—that is all he would have had to testify to.

Mr. MARSHALL.—I will withdraw the question.

The COURT.—You can go into those things when you come to your side of the case.

(Testimony of Tom Brown.)

Mr. MARSHALL.—That is all the cross-examination.

Mr. COBB.—That is all.

(Witness excused).

PLAINTIFF RESTS. [30]

DEFENSE.

**Testimony of Mrs. Harriet S. Pullen, in Her Own
Behalf.**

Mrs. HARRIET S. PULLEN, the defendant herein, upon being called as a witness on her own behalf, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. MARSHALL.)

Q. Mrs. Pullen, you are the defendant in this case? A. Yes.

Q. Where do you live? A. Skayway and Dyea.

Q. Mrs. Pullen, I wish you would state briefly what agreement you made with Tom Brown in regard to employment.

A. I told him I would give him \$1.00 a day until he could find something else to do.

Q. Did you ever have any different agreement with him than that? A. No.

Q. Now, during the time that this agreement was in existence, leaving out of consideration the \$250.00 which he admits you paid him and the \$28.00 which he admits you furnished him in clothing, and the \$6.00 and the \$5.00, the two items that he testified to this morning that you gave to him—in addition

(Testimony of Mrs. Harriet S. Pullen.)

to those did you ever pay him any other sum of money? A. Yes, often.

Q. Have you any means at this time of telling what those sums of money were? A. No.

Q. What is the reason that you have not?

A. The house burned down and everything was burned.

Q. Did you have any record? A. Yes.

Q. What became of that record, Mrs. Pullen?

[31]

A. They were burned in the house — everything was burned.

Q. Those were the records of the payments you made to him? A. Yes.

Q. Now, Mrs. Pullen, I hand you three checks, and will ask you to look those over and tell me when and where they were given to Tom Brown.

A. This first one for \$50.00, Tom came over and wanted to get some clothes, and I said all right, and I took my check-book and went down to Mr. Kennedy's, the clothier, and right in Mr. Kennedy's office—Mr. Kennedy stood right behind me and saw me write the check,—we agreed upon it that he had \$50.00 coming to the 1st of May, and we would settle up to the 1st of May. I wrote on there, "For services up to the 1st of May," and I handed it to Tom Brown. Mr. Kennedy saw me write that on there, and would so testify if I could have him here. I handed it to Tom Brown, and Tom turned around and handed it to Mr. Kennedy, and as you will see

(Testimony of Mrs. Harriet S. Pullen.)

Mr. Kennedy indorsed it, "Will Clayson, by James Kennedy," on the back.

Q. Now, the question was when those checks were given to him. I think you have stated fully in regard to the first \$50.00 check. Tell me about the others.

A. Why, I paid them in my room, and I made it in two checks.

Q. What date was it? A. On June 13th.

Q. And those are the checks that were given, are they?

A. Yes, these are the checks that were given. I asked Tom how much he had coming to him, and I said, "You know the books were burned, Tom, and you know that is the only account I had"; and everything was burned up when his house burned down with my things in it. I did not think he had \$200.00 coming to him, but he thought he had, and I said, "Very well, we won't have any dispute over it." So I made the checks [32] in two, because, I said, "You know your failing now"; if he would get it in one he might lose it, but he would not lose it if I made it in two, and it was made in two checks; he thanked me. I said, "Now, Tom, we are all squared, aren't we?" And he said, "Yes." And we shook hands, and he left, and he never, from that day to this, has asked me for a cent.

Mr. MARSHALL.—I offer these in evidence, if the Court please.

Mr. COBB.—No objections.

(Whereupon said checks were received in evidence

(Testimony of Mrs. Harriet S. Pullen.)

and marked, respectively, Defendant's Exhibit 1, 2 and 3.)

Q. Now, Mrs. Pullen, I will ask you whether or not the words on those checks which I have read to the jury were on the checks at the time you gave them to Tom Brown?

A. Oh, certainly they were.

Q. Now, tell how you arrived at a settlement of your account with Tom Brown.

A. Well, as I told you everything was burned up. Of course, I knew about how we stood, but I asked Tom, and that was his figures, \$200.00, and I paid him exactly what he said rather than have any controversy; I thought I was over paying him a little, but I thought it was better than to have any feelings, and I paid him exactly what he asked me to pay.

Q. Did he claim any additional amount due him at that time?

A. Oh, never. He shook hands and thanked me and said goodbye.

Q. Did you ever have any such conversation with him, Mrs. Pullen?

A. I was walking on the wharf, going to Haines one day, and just as I was going down the steps Tom had been drinking and he ran into me and nearly knocked me over. I went right on, and he said, "You have been slandering me and I am going to make it hot for you." Those are the only words Tom ever said to me. He did not say I was owing him anything—he said, [33] "You have been slandering me and I am going to make it hot for you"; and the

(Testimony of Mrs. Harriet S. Pullen.)

next thing I knew this man (indicating Mr. Logan) came into my house; he had been drinking, too, and he handed me these papers for \$850.00.

Mr. COBB.—I object to her answering that question in that manner.

The COURT.—The objection is overruled.

Q. That was the only words that Tom Brown,—

A. Had ever spoken to me—that is the only conversation we ever had, and I did not say anything.

Q. Now, Mrs. Pullen, what is your custom in the matter of writing on checks anything further than the mere order to pay so and so?

Mr. COBB.—I object to that as irrelevant and immaterial—that is a self-serving declaration.

The COURT.—I do not think her custom makes any difference. If she swears it was on there when she gave the check, until that is disputed in some way the custom does not make any difference.

Mr. MARSHALL.—Now, if the Court please, under the pleadings, and as your Honor has defined the issues, there is only one matter I want to go into, which I understand your Honor will not permit, and that is the question of the capability of Tom Brown as a farm-hand, and the actual value of his services. The reason I offer it is simply tending to show the reasonableness of the contract that was entered into by the defendant with him. I wish to make that offer.

The COURT.—Anything that Mrs. Pullen knew as to Tom Brown's capacity or capability at the time she made the contract is admissible as showing the

(Testimony of Mrs. Harriet S. Pullen.)

probability or improbability of her making any such contract as he alleges, but anything [34] going to show how Tom Brown performed his services or his duties is not admissible, because that is all covered by the payment that has been made. There is not any contest in the pleadings that Tom Brown did not do what he agreed to do. The only thing is that Mrs. Pullen says, "I never agreed to pay him more than \$30.00 a month." She may show, if she can, that she knew what kind of a man he was, and knew what he was to do, and that she would not pay \$60.00 a month to a man to do the services which he was to do, and which she thought were only worth \$30.00 a month. She can show that, but she cannot show how he did perform his services, because that would be opening up a question that is not in the case. She can show what kind of a man Tom Brown was, as throwing light on the probability or improbability of her contract being \$30.00 a month or \$60.00 a month. You may go into it as far as I have indicated, but you cannot go into it to show how he performed his services, because he performed them evidently, and there is no controversy on how he performed the services.

Q. Mrs. Pullen, I will ask you then if at the time you employed Tom Brown you knew anything about his capabilities as a workman generally?

A. Oh, yes, he worked for me as a chore boy around, you know.

Q. How long had he been doing that?

A. Well, he worked with me long enough to get

(Testimony of Mrs. Harriet S. Pullen.)

some money to go to Juneau and try and get work down here. I don't know just how long. He said he thought if he could only get down here he could get work, and he came down to Juneau and he could not get work, and he came back and said, "Mrs. Pullen, I could not get anything down there. It was winter time, and I could not get anything down there."

Q. What time was it that he worked for you before going to Dyea? [35]

A. In October and November, working in the house, and doing odd jobs around generally.

Q. Did you know at the time you employed him anything about his capacity as a workman?

A. Yes, but you know it was like this, I needed somebody there all the time, don't you see, and even though he could not perform the work, I hired other men to go over and do it—I hired a man to go and plant the potatoes and I hired a man to do the haying, and I hired a man to do everything like that, to go over by the day—but he was there to kind of look after things, and I expected my son home to look after the place and things went along, and then Tom wanted to get his citizenship papers, and I kept hiring other men to do the work, and I got along with Tom's services, and I agreed to pay him \$1.00 a day. I never felt that he was worth that much, as far as the work was concerned, but it was worth that much to have somebody there all the time.

Mr. MARSHALL.—You may cross-examine.

(Testimony of Mrs. Harriet S. Pullen.)

Cross-examination.

(By Mr. COBB.)

Q. You say he worked for you two months before he went over in December, 1915?

A. No, I said he had worked at odd times during the months of October and November, now and then. You know he was drinking very hard at that time.

Q. You just answer my questions.

A. Oh, yes.

Q. What sort of a place did you have over there at Dyea?

A. Oh, I had just bought this little farm.

Q. What buildings did you have on it?

A. I didn't have much of anything at that time—I fixed it up, [36] you see—I worked on it afterwards?

Q. What sort of buildings did you have over there at the time it was burned?

A. Oh, I had a nine-room cottage, which had just cost me \$900.00, when Tom burned it down—I had finished it up and was getting it ready for my family.

Q. You do not accuse Mr. Brown of burning it down, do you?

A. There was nobody else there—of course he burned it down—naturally, of course; I do not say that he did it purposely—nobody would do that.

Q. Did you have it furnished?

A. I had it furnished, certainly—a sewing-machine, a lot of dishes, a new range, Majestic range, and my pans and all my milk outfit, just new—just bought it.

(Testimony of Mrs. Harriet S. Pullen.)

Q. Did you have any desks, dressers, and bureaus in it? A. I had one bureau in it.

Q. Were you living over there at that time, at the time it burned down?

A. I had my own quarters down below; I didn't have the same house that Tom had; I had my own house.

Q. You had your own house? A. Yes.

Q. That was not burned? A. No.

Q. Nobody stayed in this place but Tom?

A. Nobody but Tom.

Q. How came you to leave your records in it?

A. I did the cooking there, and I had a special pantry in which I kept stores, and I had this little book under the top shelf, where it was handy for me to write down anything I bought Tom.

Q. How did it happen that you did not have it in your own house?

A. I told you I cooked up there all the time—that was the living [37] house; I was building that house for my family.

Q. You always paid these sums of money you have spoken about when you were up there cooking?

A. I handed it to him at different times; sometimes it was down at the boat, when I would meet him down there, and he would say, "Bring me over \$5.00," or "Bring me over \$10.00." I know one time I took him \$20.00 in change; I had it tied up in my handkerchief—it was quite a bit of change.

Q. It was always over at Dyea that you paid him?

A. Why, yes; where else could it be?

(Testimony of Mrs. Harriet S. Pullen.)

Q. And the records were kept in Tom Brown's house and not in yours? A. Yes.

Q. In a little book that was burned up?

A. Yes.

Q. Now, Mrs. Pullen, did I understand you to tell Mr. Marshall that you kept a memorandum of all the money that you paid Tom Brown except the checks that you gave him?

A. Why, of course I kept a little memorandum.

Q. And in that memorandum you put down all the money you ever paid him except what you paid him by check?

A. I will tell you—when I would see Tom I would say, “Tom, you got so and so—you have got so and so—” and I would mark it down so we would know how we stood.

Q. That is not an answer to the question. I understood you to say to Mr. Marshall that you kept a memorandum of all the money you ever paid him except these checks, which of course were memorandums themselves, is that right?

A. It was my custom when I gave him money to make a little note of it, like anybody would.

Q. And you did that always when you gave him money?

A. I don't say I did it always but I did it sufficient to know [38] where we stood all the time.

Q. And that book was burned in the fire there?

A. Yes, it was in the pantry on the top shelf.

Q. Then, outside of these checks you have not paid him any money since that fire, have you?

(Testimony of Mrs. Harriet S. Pullen.)

A. That was only a very short time ago, you know.

Q. You can answer that question. You have not paid him any money except the checks since the fire?

A. No, not that I remember—never any money—I bought clothes all the time, and I bought him one pair of shoes that cost \$9.00 and over.

Q. You put down whatever you got for him, didn't you?

A. I have it on my bills. When I would get these statements from the store I would say, "They are for Tom—just write on there they are for Tom."

Q. Where are your bills?

A. I did not bring anything along with me—I did not know this case was coming up.

Q. You have not, however, paid him any money except what you put down in that little book that burned on February 4th? A. Yes, \$200.00.

Q. I mean outside of the checks, that is all?

A. I don't remember anything on that.

Q. I hand you now Defendant's Exhibit 1, being a check dated June 6, 1916, payable to Tom Brown, \$50.00, and signed by you. You say at the time you wrote out that check, the words here, "For services up to May 1st, 1916"—you wrote that at the same time? A. At the same time.

Q. Did you use two inkstands?

A. No, I did not; I never had it in my hands—Tom got it.

Q. Is that your handwriting? [39]

A. That is in my handwriting, sir, and the man watched me write it and will so testify.

(Testimony of Mrs. Harriet S. Pullen.)

Q. You haven't got him here to testify, have you?

A. No, but he said he would come down and testify.

Q. You had an opportunity to take his deposition, didn't you?

A. These were down here, that is why.

Q. Didn't you know that I signed a stipulation with your counsel here to take any deposition you wanted there? A. Yes, but I was not there.

Mr. MARSHALL.—I can state that I also know that deposition was sent off to Skagway, and will be back here and be additional testimony in this case, but I did not intend to delay the case, and there has not been a boat from there for a long time.

Mr. COBB.—You did not take the deposition of Mr. Kennedy, however.

Mr. MARSHALL.—No, I did not, because I never learned of it until Mrs. Pullen came down here, and then it was too late.

Q. Now, Tom quit you on June 5th, didn't he?

A. I do not know the day.

Q. Why did you admit it in your pleadings, that he did? A. I did not.

Q. I hand you now your answer in this case and ask you if that is your signature?

A. Yes, that is my signature.

Q. You read over the answer before you signed and swore to it, didn't you?

A. Oh, it has been so long ago—of course, I suppose I did.

Q. Now, in this you say here, "Answering para-

(Testimony of Mrs. Harriet S. Pullen.)

graph 9, defendant admits that plaintiff quit her employ on or about the time alleged," that was June 5th—is that correct?

A. I don't remember that he ever quit at any time. He was [40] going to go and get some work with a cattle-man, and the answer came back that they did not need him, and he did not have any place to go. I saw the letter where they said,—

Q. Answer my question—I am asking you about this—you signed and swore to that, didn't you?

A. Of course I did.

Q. And he had quit work on June 5th?

A. He had not lost any time about it, you know.

Q. Did he quit work on that day, as you admit that he did? A. He came over to Skagway.

Q. Did he quit work—that is a very simple question.

A. I don't know how you mean; he didn't lose any time—he worked right along.

Q. He quit his job on or about that date, didn't he? A. Yes.

Q. Then, if you were paying him on the sixth, and were settling with him in full, why did you put down here, "In full to May 1st"?

A. Because he was getting his clothes ready to go back to work—he was getting his clothes over at the store.

Q. You did not settle with him in full that day?

A. Why, no, I settled up to the 1st of May.

Q. Now, you stated in your examination in chief that you gave him two checks so that if he lost one

(Testimony of Mrs. Harriet S. Pullen.)
of them he would have the other?

A. Well, you know Tom's failing is drinking, and if he would cash all the \$200 he might lose it all at one time, you see; and I made it out in two checks so he could cash the \$50 one and have the rest left, and he would not lose it all. That is what he did, he lost every bit of his money—

Q. What was there to prevent him from cashing the \$150 one, too? [41]

A. There was nothing to prevent it, but I fixed it so he would not be so liable to lose it all—that was all. I wrote them both at the same time—right at the same time, and I said, "Tom, you know your failing, so I will make it in two checks, so when you cash one you won't have so much money." And I went to the bank afterwards and found out that he had cashed them both about the same time.

Q. When did you find out that?

A. The time that he ran into me on the wharf; and my porter was down there and saw that action and he said to me, "Mrs. Pullen, I would have that man arrested"—

Q. Never mind about that. I am asking you simply why you took the pains to find out when he cashed them.

A. That is when I did. He said that man was telling around that I owed him so I went over to the bank and asked them if they would not look at those checks so they could be a witness to them. I said, "That man is telling that I am owing him," and I said, "I want you and your assistant here to tes-

(Testimony of Mrs. Harriet S. Pullen.)

tify"; so Mr. Landsborough and his assistant said yes, and he got those checks, and he said they were cashed about the same time, and he said they would be my witnesses to the checks—

Mr. COBB.—I move that that be stricken as not responsive and hearsay.

The WITNESS.—No, no hearsay about it.

Mr. COBB.—I ask that the jury be instructed not to pay any attention to what Mr. Landsborough said.

The WITNESS.—That is the banker who witnessed them.

The COURT.—Ask another question and let us get along.

Q. You did know then as early as about July 2d, 1916, that Tom Brown was claiming that you owed him wages? A. The last of June?

Q. The last of June. A. Yes.

Q. I said as early as July 3d? [42]

A. Because my porter came in and told me this, and he said, "Those two men are drunk."

Q. I am not asking you what your porter said. I am asking if you knew at that time that Tom Brown was claiming that you owed him wages?

A. Yes.

Q. You say you never learned it from him?

A. No, never.

Q. You took pains then, you say, to prepare your defense? A. Yes, of course.

Q. You were sued in August?

A. I believe something like that.

(Testimony of Mrs. Harriet S. Pullen.)

Q. This suit was filed August 25th, the record shows. A. Yes.

Q. You have had ever since then to prepare your defense and get your witnesses to testify for you, haven't you?

A. I never dreamed it was going to come to trial. When anybody don't owe anybody anything I don't see how you can prepare to go to trial when you don't owe him anything.

Q. If you will answer my questions we will get along faster. You have had ever since then to prepare your defense?

A. I have had many things to do besides that.

Q. You have had ever since then, haven't you, to prepare your defense and get your testimony?

A. I never thought it would come up for trial.

Q. That is not an answer to my question. You have had ever since then to prepare for your defense.

Mr. COBB.—That is self-evident and I will drop it. That is all. [43]

Redirect Examination.

(By Mr. MARSHALL.)

Q. Did Tom Brown ever have any conversation with you about quitting work along about the time you gave him that check? A. The \$200 check?

Q. No, the earlier check, or that summer, did he have any conversation with you about quitting work?

A. Well, you see the agreement was that he was to work for a dollar a day until he could get something to do there; you see, it was not by the month—

(Testimony of Mrs. Harriet S. Pullen.)

it was by the day, and he thought he could get on with Burns.

Q. Did he have any conversation with you about quitting, or give any reason for quitting?

A. I don't remember that he did.

Q. Did you ever have a cook over there?

A. Well, that was in July and August, I had a woman over there cooking for the whole crew.

Q. Did any question come up about quitting?

A. Before I sent the woman over, yes; he said if I did not send that woman over he would quit, but that was in July, and I sent her over.

Mr. MARSHALL.—That's all.

Mr. COBB.—That's all.

(Witness excused.) [44]

Testimony of J. R. Neville, for Defendant.

J. R. NEVILLE, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. MARSHALL.)

Q. Mr. Neville, were you ever over at Dyea?

A. Yes, sir.

Q. When was that about?

A. It was in July or August—I think it was the last of July—something like that; I do not remember the date.

Q. Did you at that time have any conversation with the plaintiff in this case, Tom Brown?

A. Why, yes, some.

(Testimony of J. R. Neville.)

Q. Did he express to you any dissatisfaction with his employment over there?

Mr. COBB.—I object to that as irrelevant and immaterial, whether he was dissatisfied with it or not.

The COURT.—What is the object?

Mr. MARSHALL.—The object is to show that he showed dissatisfaction with the employment, and show the reason for it; I think the reason is relevant as throwing some light on the question of his claim for wages.

The COURT.—What do you expect to develop by this witness?

Mr. MARSHALL.—That he was dissatisfied with his work over there because he said the pay was so small, and while it is not an admission that the real contract was a dollar a day, yet it is evidence that the man was working over there for what would be, perhaps, generally regarded as small wages.

The COURT.—Did he say anything about what wages he was getting?

Mr. MARSHALL.—No, simply that he was dissatisfied with the amount of wages that he was getting—that is all there is to it. I consider it would be evidence that would be of some value [45] upon that subject.

The COURT.—I do not think it would—I do not think that would throw any light on the contract one way or the other.

Mr. MARSHALL.—I think that is true, if the Court please, but I do think, as I said, it would have some bearing upon the question of wages—not what

(Testimony of J. R. Neville.)

his wages were, but whether his wages were considerable wages or whether they were small wages.

The COURT.—I do not think it elucidates the proposition one way of the other—I do not think it has any bearing in this case. The objection is sustained.

Mr. MARSHALL.—That's all.

(Witness excused.)

DEFENDANT RESTS. [46]

REBUTTAL.

Testimony of Tom Brown, in His Own Behalf (In Rebuttal).

TOM BROWN, the plaintiff herein, upon being recalled as a witness in his own behalf, having been previously sworn, testified in rebuttal as follows:

Direct Examination.

(By Mr. COBB.)

Q. Mr. Brown, you have been sworn. I hand you Defendant's Exhibit 1, being a check dated June 6, 1916, payable to you, signed H. S. Pullen, and I call your attention to the words written on here, "For services up to May 1, 1916," and ask you if those words were on there at the time you received the check and cashed it?

A. No, sir, I did not see them.

Q. I now hand you a check dated June 13, 1917, being Defendant's Exhibit No. 3, being a check for \$150.00, payable to you and signed by H. S. Pullen, and I call your attention to the words written on it,

(Testimony of Tom Brown.)

“For farm work at Dyea,” and ask you if those words were on there at the time you received the check? A. No, sir, I didn’t see them.

Q. I hand you a check dated June 13, 1917, payable to you, for \$50.00, being Defendant’s Exhibit No. 2, a check signed by H. S. Pullen, and I call your attention to the words written on it, “In full to date for farm work at Dyea,”—I will ask you if those were on there at the time you received the check and had it cashed? A. No, sir, I did not see them.

Q. Mr. Brown, you heard Mrs. Pullen’s testimony that the latter part of June, 1917, after you quit work up there and a short time before you brought this suit you bumped into her down at the dock and that you were drunk, and that you told her she [47] was slandering you—did any such talk as that ever occur?

A. No, sir.

Q. Any such incident occur? A. No, sir.

Q. I will ask you if at that time any intoxicants could be secured in Skagway?

A. The town was dry, sir.

Q. You heard her testimony that she knew you were not worth over a dollar a day? A. Yes, sir.

Q. I will ask you if you were employed a short time before you began work for her, in 1915, at a regular job? A. Yes, sir.

Q. You were? A. Yes, sir.

Q. What did you get?

A. Well, I was shipping cattle through here for P. Burns of Vancouver, and I got \$4.00 a day and board, sir.

(Testimony of Tom Brown.)

Q. Four dollars a day and expenses?

A. Yes, sir, from Vancouver to White Horse and Dawson, and from Atlin to White Horse once in awhile.

Q. When was that? A. In 1915.

Q. What time of the year?

A. Well, from June until September—the latter part of September.

Q. Then what did you do?

A. Well, after I came down to Skagway—I was waiting for my partner to come in from,—I came from White Horse, and had my partner back in Dawson, and I came to Skagway and longshored.

Q. What were your average earnings as a longshoreman?

A. We were getting 58 cents an hour. [48]

Q. Do you know what was the average that you earned?

A. The boats did not come in regular, you see, but when they came in we worked day and night.

Q. What were your average earnings for a week or a month? A. About \$50.00 a month.

Q. You belonged to the longshoremen's union, did you? A. Yes, sir.

Q. I will ask you if you are an able-bodied man and able to do an average day's work?

A. Well, sir, I am down here in the Ready Bullion on the 2300, and I worked from October until last Saturday—that is the first day I have missed except every other Sunday we change shifts, you see, and there is only four hours to work—well, it is too

(Testimony of Tom Brown.)

far to go down, and the majority of the men do not work, only the pumpmen and men that are bound to go, you see.

Q. That is the only time you have missed during the period, when they changed, is it?

A. Yes, sir, except Christmas—they laid off a day or two for Christmas holidays.

Q. The mine was closed then? A. Yes, sir.

Q. What are your wages? A. \$3.00 a day, sir.

Q. How long have you been in Alaska?

A. I have been passing through here—sometimes I would miss a couple of seasons—since 1900.

Q. Have you ever at any time worked in Alaska for less than \$2.00 a day and board?

A. No, sir, I never have.

Q. Now, I want you to describe to the jury the work that you did—that you were to do over there under your arrangement— [49] the work that you were to do—what was the work that you were hired to do? Give the jury the best idea of it you can.

A. Milk and attend to the cows, plow the land and put in the crop, haul hay; in the winter time haul wood and keep a fire in the potato-house, and a majority of the time I had to cook for myself.

Mr. MARSHALL.—We object to this, if the Court please.

The COURT.—You admit in your pleadings the work that he was to do. The only thing this is admitted for is to show whether or not it is probable or reasonable to suppose that the contract was \$2.00

(Testimony of Tom Brown.)

a day or \$1.00 a day. There is no contest over the fact that he did not do the work he was employed to do, but the contest is about the contract—what the contract was in regard to the work he was employed to do.

Mr. MARSHALL.—It is expressly denied that he did milk any cows or make any butter—that is milk any cows for Mrs. Pullen. They allege that he did, and we deny that he did.

The COURT.—Then the question is whether he was employed to do it or not. It is not a question of how well he did the work, but it is a question of what work he was to do and what the contract was as to that work. It is a plain, simple question, it seems to me, of whether there was a contract or whether there was not a contract—that is all there is in the case.

Q. (By Mr. COBB.) What were you hired to do?

A. Well, sir, attend to the cattle, haul wood, haul hay, attend to potatoes; and when I first went there we put a foundation under this Pacific Hotel, Royal and I, Mrs. Pullen's son.

Q. How many cattle were there there?

A. Ten altogether—7 cattle and 3 horses—one died and one was only there a little time.

Q. That is when you first began?

A. Yes, sir; that is when I first began. [50]

Q. At the time you went over there you knew more were coming? A. Yes, sir.

Q. How many were there later?

Mr. MARSHALL.—If the Court please, we ob-

(Testimony of Tom Brown.)

ject to that—under the Court's ruling it is not admissible.

The COURT.—How many more did you know were coming—is that the question?

The WITNESS.—Well, this winter I had 20, and before I left there were a lot of calves, and there were 30, when I came away, on the 11th of June.

Q. How many potatoes, do you know, were put in up there?

The COURT.—You need not answer that question.

Q. How much ground were you to take care of in potatoes? A. About 5 acres.

Mr. MARSHALL.—If there was any specific agreement I do not believe it is proper for him to testify how much ground he was to take care of, in potatoes.

The COURT.—Here is a plaintiff who says his contract was \$2.00 a day, and here is a defendant who says the contract was \$1.00 a day. You may show what the facts and circumstances were at the time, and what was in contemplation of the parties at the time the contract is alleged to have been entered into, for the purpose of showing which is the more probable. That is the only bearing such testimony has on the case,—which is the more probable contract to be entered into—it does not make any difference what was done under the contract, because, whatever the man was to do, there is no complaint made in the pleadings that he did not do it—only that he has been paid for it, paid what the defendant says she agreed to pay him.

(Testimony of Tom Brown.)

Q. You say there were about 5 acres of potatoes to be taken care of? [51] A. Yes.

The COURT.—Did you know that at the time you made this contract you are talking about?

A. Well, it was in December; the potatoes were planted the next spring.

The COURT.—Did you know at the time you made this contract with Mrs. Pullen how many acres of potatoes you were to take care of?

A. She told me she wanted five acres of potatoes planted.

Q. (By the COURT.) Did she say so?

A. Yes, sir.

Q. (By Mr. COBB.) Now, then, in November, 1915, just before you went over there, did you have a conversation with Mrs. Pullen in which you told her that you were coming to Juneau to see if you could get work? A. No, sir, I did not.

Q. Did you come down to Juneau?

A. I came down to Juneau to see my cousin that used to be a timekeeper at Treadwell.

Q. You did not come for the purpose of getting work? A. No, sir; I did not ask for work.

Q. You went back to Skagway, then, in December and made this contract to go over there, for \$2.00 a day? A. Yes, sir.

Q. I believe you stated this morning that in June, 1916, some time about a month before you quit there, you gave her notice? A. On the 4th of May, sir.

Q. What was said when you came over to quit, between you and her?

(Testimony of Tom Brown.)

A. Well, I walked into the kitchen and Mrs. Pullen happened to be in the front room, and I waited until she came in the kitchen.

The COURT.—I think that has all be gone into, Mr. Cobb. [52]

Mr. COBB.—All right.

Q. She did ask you, then, to go back, as I understand it, for \$65.00, for the balance of the time.

A. Yes, sir.

Q. And you agreed upon that? A. Yes, sir.

Q. Now, state to the jury whether or not Mrs. Pullen ever paid you anything on your wages for the period from December, 1915, up to the end of your first contract in June, 1916, other than the \$50.00 that you testified to this morning.

A. Well, there is \$6.00 in January, you know, and \$5.00 in—

Q. \$3.00 was for you and \$3.00 to be charged back to her? A. Yes, sir.

Q. And that was all? A. Yes, sir.

Q. State whether or not outside of this little matter of clothes you mentioned and have already testified to, she ever paid you anything on wages for the period from June 6th or 7th, 1916, up until you quit on June 11th, 1917, except the \$200.00.

A. No, sir.

Q. Which is represented by these checks?

A. No, sir, never received a cent—no, sir.

Q. You heard Mrs. Pullen's testimony about having a book that she kept up in that house?

A. Yes, sir.

(Testimony of Tom Brown.)

Q. Was there any such book as that ever kept there?

A. I never saw such a book, sir; she never produced it to me; I never saw such a book. The drawer was open where she says it was, and I used to be in there more or less every day and I never saw the book.

Mr. COBB.—You may cross-examine. [53]

Cross-examination.

(By Mr. MARSHALL.)

Q. You talked about the earnings of a longshoreman up there in Skagway? A. Yes, sir.

Q. Do you know what they earn in the winter, on an average?

A. Well, in the fall they make pretty big money.

Q. In the winter?

A. Yes, in the fall up to Christmas.

Q. You consider \$50.00 a month would be about the average? A. No, sir, I do not.

Q. Isn't that what you testified to?

A. \$50.00 a month?

Q. Yes.

A. No, sir; not \$50.00 a month. If I said \$50.00 a month I made a mistake.

Q. What did you mean to say?

A. You can make lots more than \$50.00 a month. I should say \$50.00 a week, more or less. The first time, I think, I went longshoring in Skagway that fall, before I went to Mrs. Pullen's, I worked that day and I worked that night, and I made \$9.00.

(Testimony of Tom Brown.)

Q. I wanted to ask you with respect to that work during the winter—what is the extent of it then—how much are the average earnings in the winter?

A. I never worked later than November.

Q. Don't you know as a matter of fact that in the winter there is little or nothing to be earned up there at that work?

A. There was quite a lot of ore—loading the ores, and before I went with Mrs. Pullen the boats were coming in more or less every week loading ore, and there was quite a lot of work.

Q. Loading ore from the mine in the interior?

[54] A. Yes, sir, more or less.

Q. And what is the extent of the work on boats coming in there—on freight coming in there?

A. Well, they always rush it in in the fall to send it over to Atlin and White Horse and over to Dawson before the ice breaks up.

Q. During the winter do they send in any?

A. I told you I never done any longshore work after November.

Q. I am asking you whether you know anything about the situation there. Don't you know as a matter of fact that, the "Spokane," "Seattle" and "Jefferson," when they go up there, stay just about an hour?

A. They might right now, but they didn't when I was up there.

Q. Don't they do that all the time during the winter?

A. I couldn't say nothing after November.

(Testimony of Tom Brown.)

Q. You have never worked in Skagway in the winter time? A. Not after November; no.

Q. At any employment?

A. I worked there this last fall until November, and then after November I went around and saw a few friends, and I came down here to Treadwell and asked for a job and got one.

Q. Didn't you say you began on October 3d at Treadwell?

A. Yes, sir; but I was in Juneau a couple of weeks looking around and seeing my friends.

Q. You said you worked up there until November, didn't you? A. November, yes.

Q. And then you got here in October?

A. I think I left Skagway about the 17th of—about the 7th of October—something like that.

Q. Didn't you say just a moment ago that you worked there until November? A. Yes. [55].

Q. You said you worked there until November?

A. Yes.

Q. And then a few minutes ago you said that you began at Treadwell on the 23d of October?

A. I made a mistake—I see where I made a mistake.

Q. That is just a mistake? A. Yes, sir.

Q. Now, you testified also that you had an express understanding with Mrs. Pullen that there were to be five acres of potatoes planted? A. Yes, sir.

Q. Where did you have that understanding with her?

(Testimony of Tom Brown.)

A. Well, right opposite Jack Anderson's—Mr. Anderson's.

Q. That was all told to you at the time she engaged you there in December?

A. She told me in the spring she would want me to put in five acres of potatoes, and also a lot of grain, and I put in about 20 acres of grain.

Q. Did she tell you anything else about what she wanted planted?

A. Well, yes; she said she would want a little small crop put in.

Q. Crop of what?

A. Well, turnips, and such like, and potatoes.

Q. As a matter of fact, Mr. Brown, when you went over there, weren't you simply going over as a sort of a caretaker of property at the time?

A. No, sir, I was not.

Q. Did you go over immediately after you made the arrangement? A. With Mrs. Pullen?

Q. Yes. A. Yes, sir. [56]

Q. Did she take you over there personally?

A. No, Mr. Pratt took me over; Mrs. Pullen walked down to the wharf with me to the boat; it was snowing and she came back to Skagway.

Q. How long did Mr. Pratt remain over there?

A. I am sure he came right back that day.

Q. But during the winter?

A. Oh, he was working on the boat in December and January; I think he went away the latter part of January.

(Testimony of Thomas Moseek.)

Mr. MARSHALL.—That's all.

Mr. COBB.—That's all.

(Witness excused.) [57]

Testimony of Thomas Moseek, for Plaintiff (In Rebuttal).

THOS. MOSEEEK, called as a witness on behalf of the plaintiff, being first duly sworn, testified in rebuttal as follows:

Direct Examination.

(By Mr. COBB.)

Q. State your name. A. Thomas Moseek.

Q. Where do you reside?

A. I have lived in the Yukon Territory for the last 12 years.

Q. Where do you reside now?

A. In Thane, Alaska; my family is in Juneau.

Q. Do you know the plaintiff, Mr. Brown?

A. I do, sir.

Q. Did you know him when he was working for Mrs. Pullen on the Dyea ranch?

A. Yes, sir, I met him in Dyea.

Q. What time were you up in Dyea?

A. I think it was the 7th or 8th of February, 1917.

Q. During the time that you were there did you see the extent of the job that he had on hand taking care of that property? A. I did, sir.

Mr. MARSHALL.—If the Court please, that is exactly opposed to the Court's ruling, the extent of the job that he had on hand over there.

The COURT.—This question is simply did you

(Testimony of Thomas Moscek.)

see it, and he said he did. That does not help nor hurt anybody, and it is preliminary, I presume, to the next question.

Q. Just describe to the jury the job that he had there—what he was doing?

Mr. MARSHALL.—Now, if the Court please, I object to that.

The COURT.—What is the object and purpose of that, Mr. Cobb?

Mr. COBB.—It is admitted in the pleadings that he did the work [58] that he was to do, and the only way we can get at it is, I think, for him to describe what the man was doing, the job that he had there, to show what he had to do.

The COURT.—The objection is sustained.

Mr. COBB.—To which we except.

The COURT.—The exception will be allowed.

Mr. COBB.—That's all.

Mr. MARSHALL.—No questions.

(Witness excused.)

PLAINTIFF RESTS. [59]

SURREBUTTAL.

Testimony of Mrs. Harriet S. Pullen, in Her Own Behalf (In Surrebuttal).

Mrs. HARRIET S. PULLEN, the defendant herein, being recalled as a witness on her own behalf, having been previously duly sworn, testified in surrebuttal as follows:

(Testimony of Mrs. Harriet S. Pullen.)

Direct Examination.

(By Mr. MARSHALL.)

Q. Mrs. Pullen, I want to ask you whether or not you had any custom with respect to writing on your checks what they were for?

Mr. COBB.—We object to that as not proper surrebuttal.

The COURT.—What is that surrebuttal of?

Mr. MARSHALL.—This morning I attempted to offer it, and your Honor said if they disputed it being on there that I could prove it was put on in accordance with a custom that she has of making notations on her checks.

The COURT.—I did not mean to say I was going to admit it no matter what arose. It would not make any difference what her custom was or was not. She goes on the witness-stand and swears it was there at the time she gave him the check—what has her custom got to do with it?

Mr. MARSHALL.—She has already testified to that, so I will have no further questions to ask her.

The COURT.—If that is all there is to it, it is not surrebuttal.

Q. (By Mr. MARSHALL.) Did you have any conversation with Tom Brown before he went over there as to the quantity of potatoes that you wanted him to plant?

A. I did not expect he was going to be over there that long, you know—he just went over to stay for a while.

Mr. MARSHALL.—That is all.

Mr. COBB.—No questions.

(Witness excused.)

TESTIMONY CLOSED. [60]

Instructions of Court to Jury.

The COURT.—(Orally.) Gentlemen of the Jury: This is a suit brought by Brown on an express contract, or what he claims is an express contract, to pay him \$2.00 a day or \$60.00 a month. Brown is the plaintiff in the case, and the plaintiff in every case has got to prove his case. In a criminal suit, the plaintiff, which is the Government, has got to prove its case beyond a reasonable doubt. In a civil case the plaintiff has got to establish his case by a preponderance of the evidence, by a greater weight of the evidence. In other words, Brown has got to bring before you, produce before you, stronger evidence, weightier evidence, more convincing evidence, that there was a contract at \$60.00 a month, or \$2.00 a day, than the defendant has got to produce that there was not any such contract.

When these parties put their case on paper the scales were just evenly balanced. You could not at that time have returned a verdict for the plaintiff, for the reason that the plaintiff has got to have better evidence and stronger evidence than the defendant has got to have. Now, let us see how the evidence has changed the situation, if it has changed it at all. The plaintiff introduces some evidence, and his side of the scales drops—he has got stronger evidence; but then the defendant comes on and introduces some

evidence, and her side of the scales drops. Now, when all the evidence has been introduced if the scales are just evenly balanced, then the case is just the same as it was when they started out—neither side has a preponderance, and the plaintiff would have to lose his suit, because he has got to have stronger evidence and weightier evidence than the defendant has got to have. Now, then, what is the situation here? Plaintiff gets on the stand and swears that there was a contract for \$2.00 a day, or \$60.00 a month. The defendant goes on the stand and swears the contract was a dollar a day and board. Now, then, [61] if those two people and the circumstances in evidence are just evenly balanced in your mind and you cannot say which to believe, the scales are evenly balanced, and your verdict would have to be for the defendant; but if the testimony of Mr. Brown and the circumstances in evidence have convinced you that he is more worthy of belief—if his conduct on the witness-stand has been such as to carry conviction to your mind to a greater degree than Mrs. Pullen, then the scales are not evenly balanced—he has got the weightier side of the scales. If he has not produced more evidence, stronger and weightier evidence, then he has not got the stronger side of the scales. Now, it is for you to decide whether or not Brown has produced stronger and weightier evidence that he did have a contract at \$60.00 a month or \$2.00 a day than Mrs. Pullen has produced that he did not have. If he has produced more evidence, stronger evidence, that he did have that kind of a contract, then your verdict should be

for him in such sum as you find to be due; but if he has not produced the stronger evidence, weightier evidence and more convincing evidence, or if the scales are just evenly balanced in your mind, then you must find a verdict for the defendant.

Mr. COBB.—You have made one error in stating the issues. The last year was \$65.00, after he resumed work, and not \$60.00.

The COURT.—It is virtually the same—that does not alter the principle I was trying to elucidate to the jury. I believe part of the time he does claim that his contract was \$65.00 a month, and Mrs. Pullen denies that with just as much vehemence as she did the \$60.00 contract. It is not a case where you can say “We will give him \$45.00 a month.” [62] It is either \$60.00 a month or it is nothing. It is the contract that he alleges, and it is the contract that she denies that he relies on, and you cannot split the difference—you cannot do anything of that kind. It is either \$60.00 a month or it is not \$60.00 a month. If it is not \$60.00 a month then the plaintiff cannot recover.

You are the sole judges of the credibility of the witnesses and of the weight to be attached to their testimony. Take into consideration their candor or lack of candor, their demeanor upon the witness-stand, their intelligence as to knowing the things they pretend to testify about, and their inclination or disinclination, as it has appeared in the evidence, to tell the truth, the whole truth, and nothing but the truth. You consider their interest—of course they are both interested, so far as that is concerned—

take all the facts into consideration. It is not a question of whether \$1.00 a day is too little, and it is not a question of whether \$2.00 a day is too much. I might agree to pay you \$2.00 a day for services that are worth only 50 cents a day, or I might agree to pay you 50 cents a day for services that are worth \$2.00 a day—that is not the question; when the claim is on a contract, the contract must be proven, no matter what the services were worth. The only reason the evidence was admitted as to what this man got before was for the weight it might have, or might not have, just as you look at it, on the question of whether or not such a contract was probable.

You take the pleadings, and if you find for the plaintiff assess the amount of his recovery; if you find for the defendant sign the verdict which reads for the defendant.

Mr. COBB.—We except to *the* that they find for the defendant unless they think it was a contract for \$2.00 a day, because under the evidence if he was working for only a dollar a day, she would owe [63] \$200.00—we except to that part of the instructions.

Which said exception was taken before the jury retired from the bar of the court.

And the above and foregoing were all the instructions given.

And because the above and foregoing matters to not appear of record, I, Robert W. Jennings, the Judge before whom said cause was tried, do hereby certify that the above and foregoing is a full, true, and correct bill of exceptions, and the same is hereby

approved, allowed and ordered filed, and made a part of the record herein. And I further certify that said bill of exceptions was presented and allowed during the time allowed by order orders of the Court made during the term at which said cause was tried.

Dated this the 1st day of August, 1918.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska, First Division. Aug. 1, 1918. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [631½]

*In the District Court for Alaska, Division No. 1, at
Juneau.*

Nò. 1716-A.

TOM BROWN,

Plaintiff,

vs.

H. S. PULLEN,

Defendant.

Assignment of Error.

Now comes the plaintiff, and assigns the following error committed by the Court during the progress of the trial and in the rendition of the judgment herein, upon which the plaintiff will rely in the Appellate Court.

The Court erred in instructing the jury as follows:

“It is either \$60.00 a month or it is nothing.

It is the contract which he alleges, and the con-

tract which she denies, that he relies on, and you cannot split the difference—you cannot do any thing of that kind. It is either \$60.00 a month, or it is not \$60.00 a month. If it is not \$60.00 a month the plaintiff cannot recover.”

And for the said error plaintiff prays that the judgment of the Court below be reversed and the cause remanded for a new trial.

J. H. COBB,
Attorney for Tom Brown, Plaintiff.

Filed in the District Court, District of Alaska,
First Division. Aug. 3, 1918. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [64]

*In the District Court for Alaska, Division No. 1, at
Juneau.*

No. 1716-A.

TOM BROWN,

Plaintiff,

vs.

H. S. PULLEN,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States to the Judges of
the District Court of the United States for
Alaska, Division No. 1, GREETING:

Because in the record and proceedings as also in
the rendition of a judgment of a plea which is before
you, wherein Tom Brown is plaintiff and H. S. Pul-

len is defendant, a manifest error hath happened to the great damage of the said Tom Brown as by his petition doth appear.

We being willing that error, if any hath happened, should be duly corrected, and speedy justice done to the parties in that behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things pertaining thereto, to the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, so that you have the same before said Court on or before thirty days from the date of this writ, so that the record and proceeding aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, and the seal of the District Court for Alaska, Division No. 1, affixed at Juneau, Alaska, this the 3d day of August, 1918.

[Seal]

J. W. BELL,
Clerk.

Allowed this 3d day of August, 1918.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska, First Division. Aug. 3, 1918. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [65]

*In the District Court for Alaska, Division No. 1, at
Juneau.*

No. 1716-A.

TOM BROWN,

Plaintiff,

vs.

H. S. PULLEN,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, Tom Brown, as principal, and Emery Valentine, as surety, hereby acknowledge ourselves to be indebted and bound to pay to H. S. Pullen the sum of Two Hundred and Fifty Dollars, good and lawful money of the United States, for the payment of which sum well and truly to be made we hereby bind ourselves, our and each of our, heirs, executors, and administrators, jointly and severally, firmly by these presents.

The condition of this obligation is such, however, that whereas the above-bound Tom Brown has sued out a writ of error in the above-entitled cause from the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment rendered in said cause on the 4th day of April, 1918.

Now, if the said Tom Brown shall prosecute his writ of error to effect, and pay all such costs and damages as may be awarded against him if he fail to make his plea good, then this obligation shall be null and void; otherwise to remain in full force and effect.

Witness our hands this the 2d day of August, 1918.

TOM BROWN,

By J. H. COBB,

His Attorney of Record.

EMERY VALENTINE.

Approved as to form and sufficiency of surety, this the 3d day of August, 1918.

ROBERT W. JENNINGS,

Judge.

[Endorsed]: No. 1716-A. Tom Brown, Plaintiff, vs. H. S. Pullen, Defendant. Bond on Writ of Error. Filed in the District Court, District of Alaska, First Division. Aug. 3, 1918. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [66]

In the District Court for Alaska, Division No. 1, at Juneau.

No. 1716-A.

TOM BROWN,

Plaintiff,

vs.

HARRIET S. PULLEN,

Defendant.

Citation in Error.

United States of America,—ss.

The President of the United States to Harriet S. Pullen, and John B. Marshall, Her Attorney,
GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals

for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of Error lodged in the clerk's office of the District Court for Alaska, Division No. 1, in a cause wherein Tom Brown is plaintiff in error, and you are defendant in error, then and there to show cause if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this the 3d day of August, 1918.

ROBERT W. JENNINGS,
Judge.

[Seal]

Attest: J. W. BELL,
Clerk.

Service admitted this the 5th day of August, 1918.

JOHN B. MARSHALL,
Attorney for Defendant in Error.

Filed in the District Court, District of Alaska, First Division. Aug. 2, 1918. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [67]

*In the District Court for Alaska, Division No. 1, at
Juneau.*

No. 1716-A.

TOM BROWN,

Plaintiff,

vs.

H. S. PULLEN,

Defendant.

Praeipice for Transcript of Record.

To the Clerk of the District Court for Alaska, Division No. 1, Juneau, Alaska.

Sir: You will please make up the transcript of the record for the Appellate Court in the above-entitled cause, and include therein the following papers:

1. Complaint.
2. Answer.
3. Reply.
4. Judgment.
5. Bill of Exceptions.
6. Assignment of Error.
7. Writ of Error.
8. Bond.
9. Original Citation.
10. This Praeipice.

Said Transcript to be made up in accordance with the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and the rules of this Court.

J. H. COBB,
Attorney for Plaintiff in Error.

Filed in the District Court, District of Alaska, First Division. Aug. 12, 1918. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [68]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,
District of Alaska,
Division No. 1,—ss.

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 68 pages of typewritten matter, numbered from 1 to 68, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record as per the praecipe of the plaintiff in error, on file herein and made a part hereof, in the cause wherein Tom Brown is plaintiff in error, and Harriet S. Pullen is defendant in error, No. 1716-A, as the same appears of record and on file in my office, and that the said record is by virtue of the writ of error and citation issued in this cause and the return thereof in accordance therewith.

I do further certify that this transcript was prepared by me in my office, and the cost of preparation, examination, and certificate, amounting to \$32.10 has been paid to me by counsel for plaintiff in error.

In witness whereof I have hereunto set my hand and the seal of the above-entitled court this 17th day of August, 1918.

[Seal]

J. W. BELL,
Clerk.

By _____,
Deputy. [69]

[Endorsed]: No. 3201. United States Circuit Court of Appeals for the Ninth Circuit. Tom Brown, Plaintiff in Error, vs. Harriet S. Pullen, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Filed August 26, 1918.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.